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Supreme Court, U.S.
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No. 08-246

In the Supreme Court of the United States

MICHIGAN ENVIRONMENTAL COUNCIL,
Petitioner,

v.

MICHIGAN PUBLIC SERVICE COMMISSION AND INDIANA MICHIGAN POWER COMPANY,
Respondents.

On Petition for Writ of Certiorari to the Michigan Court of Appeals

PETITIONER'S REPLY BRIEF

DON L. KESKEY
Counsel of Record
CLARK HILL PLC
212 EAST GRAND RIVER AVENUE
LANSING, MI 48906
PHONE: (517) 318-3100
FAX: (517) 318-3099
Email: dkeskey@clarkhill.com

Counsel for Petitioner

October 17, 2008

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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ARGUMENT IN REPLY

I. This case involves a federal question as to whether the ratemaking powers of the state MPSC are preempted by federal law, and does not involve a fact-bound case under state law as argued by Respondents.

Respondents erroneously assert that this case does not involve a federal preemption question, but rather, state law issues concerning whether the MPSC and lower Court lawfully determined, based upon the evidentiary record, that Respondent Indiana Michigan Power Company ("IMP") was reasonable and prudent in continuing to pay fees under its breached Standard Contract, justifying recognition of the contract fees in retail rates regulated under Michigan law (Act 304, MCL 460.6a and 460.6j *et seq.*, 140a-174a).

Respondent's arguments are belied by several factors: (1) Respondent IMP (and Michigan utilities) have vigorously argued in this and other contemporaneous cases that federal preemption barred MPSC authority to adopt ratemaking remedies to protect the contract fees included in retail rates; (2) the findings of the MPSC and lower Court below that demonstrate that federal preemption was a prominent inseparable part of the reasoning that led to the result below; and (3) by the faulty process utilized below that evaded any serious effort to require acceptable evidence upon which a finding in favor of reasonableness and prudence could be based.

A. The MPSC and lower Court erroneously determined that MPSC retail ratemaking authority is preempted by federal law.

The MPSC and lower Court erroneously determined that MPSC retail ratemaking authority to adopt remedies to protect ratepayers with respect to the contract fee costs is preempted by federal law. Despite Respondent IMP's counsel's inconsistent post-hoc arguments to the contrary, IMP's counsel vigorously argued in hearings and briefing before the MPSC that IMP's continuing payment of fees under its breached contract was "mandated" by federal statute and the Standard Contract, and that the MPSC was preempted from reaching any other conclusion but that IMP was reasonable and prudent in continuing to pay the fees, without conditions or remedies to protect the fee payments. The MPSC's August 1, 2005 order (17a-23a) recited IMP's arguments (20a-21a):

> I&M also points out that it is legally obligated to pay the SNF fees, in order to retain its nuclear power plant license and its ability to access the planned federal repository. I&M further points out that escrowing of the funds is disallowed under the standard contract, and that one federal court has ruled that utilities may not escrow the funds, but must seek relief under the standard contract.

These "findings" are entirely based upon the scant and vague testimony, comprising legal conclusions, of IMP's non-lawyer lay witness (quoted in IMP's brief, pp 8-10). The MPSC Order did not cite any specific legal authority except to refer to this IMP witness.

Absent from IMP's presentation is any legal authority or case decision that supports a theory that retaliatory action could result merely because a contracting party may seek legal or contract action to protect ongoing fee payments under a contract in long-term default, or that would bar a utility from pursuing remedies under Chapter XI of the Standard Contract (129a) to pay the fees into an external interest bearing escrow as part of its "legal or contract remedies". The lower court then blithely accepted these same "findings" stating (9a, 12a):

> IMPCo presented evidence that payment of the SNF fees was mandated by federal law and its standard contract with the DOE, and that failure to make the payments could lead to imposition of interest charges and possible loss of its license to operate its nuclear facility. The PSC was entitled to rely on the evidence presented by IMPCo on this issue, rather than the evidence presented by appellants. (9a)
>
> . . .
>
> . . . The payment of SNF fees by a utility is mandated by 42 U.S.C. 10222.
>
> A witness for IMPCo testified that IMPCo's actions with respect to collection of SNF costs from ratepayers and payment of SNF fees to the DOE were reasonable and prudent. The witness noted that (1) payment was required under IMPCo's standard contract with the DOE; . . . (3) if IMPCo refused to pay the fees it risked losing its license to operate its nuclear power plant; . . . (12a)

These "findings of law" were based merely upon the opinion of a single IMP lay witness! The Court delegated its duties to undertake de novo review of statutory and constitutional issues to IMP's non-qualified witness!

A primary holding of the Court below also stated (13a):

> Appellants argue that federal law does not preempt the PSC's ratemaking powers over SNF fees. We need not consider this argument because the PSC did not rely on the doctrine of federal preemption. Moreover, a state utility commission must allow, as a reasonable operating expense, a cost incurred pursuant to a federal statute, see *ABATE v. Pub. Service Comm.*, 192 Mich. App. 19, 22-27, 480 N.W.2d 585 (1991) (holding that states must give effect to rates approved by the Federal Energy Regulatory Commission), and SNF fees paid by IMPCo are mandated by statute, 42 U.S.C. 10222(a).

Respondents do not explain how the Court's statement in the first two sentences above makes any sense since binding Michigan precedent holds that the MPSC may not decide constitutional issues, and that a reviewing Court has the duty to decide statutory and constitutional issues on a de novo basis. *Universal Am-Can v. MPSC*, 494 N.W.2d 787 (1992); *City of Taylor v. The Detroit Edison Co.*, 715 N.W.2d 28 (2006). Respondents then merely discount as "dicta" the rest of the lower Court's holdings applying preemption, based upon a misanalysis of the federal

statute and a misapplication of the "federal filed rate doctrine".

The inescapable conclusion is that the IMP's lay witness' opinion concerning the law became the basis for the MPSC and lower Court findings. This was coupled with IMP's vigorous arguments that IMP was reasonable and prudent because IMP's indefinite continuing payment of contract fees, without protective remedies, was mandated by the federal statute and contract, despite the long-term contract breach.[1] The preemption issue in fact became so predominant below as to control the result, and to make impossible any separation of the issue out of the case (as attempted by Respondents).

B. The MPSC's short-circuited process below barred the presentation of qualified evidence upon which a determination in favor of reasonableness and prudence could be made.

Respondents' premise that this case merely involves a pedestrian evidentiary dispute concerning IMP's reasonableness and prudence, and a state law issue, ignores the defunct process undertaken before the MPSC – a process that evaded any serious effort to obtain or review factual information bearing upon reasonableness and prudence.

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[1] Petitioner did not assert below that IMP should simply cease paying the fees. Rather, Petitioner asserted that, in view of the contract breach, IMP should not simply pay the fees without protective conditions or actions, and in absence thereof, the MPSC is legally empowered to protect ratepayers.

Petitioner in the MPSC case propounded a very comprehensive discovery request to IMP to seek all possible information and documents that could be relevant to determining IMP's reasonableness and prudence. Yet IMP objected to and refused to answer the discovery, and the Administrative Law Judge ("ALJ") rejected Petitioner's motion to compel discovery, and refused to strike IMP's vague lay testimony concerning legal conclusions.

If in fact the result in this case rested upon findings that IMP was "reasonable and prudent", then why was all discovery bearing upon this issue denied in the MPSC process below? Why do Respondents claim that the MPSC and lower Court based their result solely upon a lay witness' vague and unexplained legal opinion concerning the application and impact of federal law?

Contrary to Respondent's claims, the result below was not based upon even a feigned effort or interest in obtaining factual information bearing upon IMP's reasonableness and prudence, but rather, was preordained upon an erroneous perception and presumption that federal law preempted MPSC authority to undertake meaningful ratemaking remedies to protect ratepayers with respect to the ongoing fee payments under the breached contract.

C. Respondent's claims are also belied by IMP's and other utility's vigorous arguments of preemption in related MPSC cases, including a Detroit Edison case which is en route to this Court.

Respondents' claims also ignore related MPSC and lower court decisions in which nuclear utilities serving Michigan ratepayers, including IMP, have vigorously argued that the application of any MPSC ratemaking remedies to protect the SNF fee payments are preempted by federal law.

A key MPSC case is now en route to this Court. Specifically, *In re The Detroit Edison Company*, U-13808 ("DECo"), the utility filed a consolidated general rate and power supply cost recovery (PSCR) case, pursuant to all of the statutes applicable to ratemaking (including Act 304). This case was filed on June 20, 2003, several months before IMP filed the instant case before the MPSC. In *DECo*, the utility included in its rate request the cost of its SNF fees under its Standard Contract with DOE. Petitioner MEC presented extensive expert evidence in opposition to inclusion of the contract fees in rates, without protective conditions, asserting that DECo was unreasonable and imprudent, and had shown no basis for a finding of reasonableness and prudence. In response, the utility argued extensively that the MPSC must allow the contract fees in rates because MPSC ratemaking authority was preempted by federal law. The ALJ in *DECo* (302a-308a) summarized DECo's

arguments and affirmatively found that preemption applied (303a-304a):

> ...Detroit Edison continues that federal preemption requires the Commission to allow Detroit Edison the ability to recover all SNF fees and costs.
>
> * * *
>
> ...the ALJ believes that preemption prevents state intervention into the federally regulated nuclear arena.

Petitioner MEC and DECo vigorously litigated the preemption issue before the MPSC in initial briefing, and in briefs of exception to the ALJ's ruling, and replies to exceptions. The MPSC then issued its final order in U-13808, dated November 23, 2004 (relevant portions, 291a-301a). The MPSC order's 5-sentence ruling on SNF issues (297a) adopted the ALJ's preemption ruling:

> . . . The Commission finds that the ALJ cannot be faulted for his recommendation.

The MPSC's subsequent June 30, 2005 Order denying rehearing (281a-290a) in *DECo* reiterated the MPSC's adoption of the ALJ's preemption ruling. This MPSC order noted Petitioner MEC's insistence "...that the Commission is not preempted by federal law from disallowing recovery of these fees" (285a), and DECo's argument "that because federal law requires it to pay these SNF charges and fees, the Commission is preempted from preventing Detroit Edison from

recovering these costs in its rate. . . . (286a)". The MPSC rehearing order concluded unequivocally (288a):

> As the Commission intended to convey in its November 23, 2004 order, it agrees with the discussion and conclusions of the Proposal for Decision at pages 110-113. The Commission is not persuaded that it should reach a different conclusion at this time.

Petitioner MEC appealed the *DECo* case to the Michigan Court of Appeals,[2] which issued its decision on July 3, 2007, in *In re Application of Detroit Edison*, 740 N.W.2d 685 (2007). The *DECo* court (234a-280a) ignored the evidentiary record and the MPSC's preemption ruling, and the extensive briefing on the preemption issue, and rejected review on the merits (at 267a) by means of a *sua sponte* application of collateral estoppel, based upon its decision in this case *In re Application of Indiana Michigan Power Co.*, 275 Mich. App. 369, 738 N.W.2d 289 (2007).

The lower court decisions in this case and the *DECo* case were authored by the same judge. Yet the Court ignored the obvious immutable inconsistency in stating in this case (IM Power) (13a) that the Court "need not consider this argument because the PSC did not rely on the doctrine of federal preemption" and the opposite situation in the *DECo* case, wherein the MPSC adopted preemption as a basis for its decision! The *DECo* decision also ignored Michigan's binding

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[2] This appeal was filed and argued before that Court earlier than this case; nevertheless, the lower court issued its decision in DECo after the decision in this case.

published precedent that collateral estoppel does not apply to MPSC rate cases, *Consumers Energy v. MPSC*, 707 N.W.2d 633 (2005). The Court's application of collateral estoppel *sua sponte*, despite this binding precedent, violated the requirements and procedures set forth in the Michigan Court Rules, MCR Rule 7.215 (192a-195a).

Petitioner MEC appealed the lower Court's decision in *DECo*, and another case involving Consumers Energy Company ("CECo"),[3] to the Michigan Supreme Court. On September 19, 2008, the Michigan Supreme Court issued its orders denying review of Petitioner's SNF fee cost and rate issues in both cases.[4]

Petitioner MEC will promptly file a Petition for Certiorari to seek review by this Court of the *DECo* case. Petitioner requests the Court to review this case (*IM Power*) and the *DECo* case, on a consolidated basis. Such review will further refute Respondents' arguments. Respondents' situational claims are belied by the vigorous utility arguments in support of preemption made both in this case and the *DECo* case.

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[3] The lower Court's *CECo* decision is included in Petitioner's appendix at 309a-347a, which applied the lower Court's decision in this case (*IM Power*) and in *DECo* as controlling its CECo decision (see 345a-347a).

[4] The Michigan Supreme Court's order denying review of Petitioner's appeals in the *DECo* and *CECo* cases are attached in the supplemental appendix attached to this reply brief.

In yet another MPSC case, U-13771, commenced by a comprehensive generic complaint (374a-459a) filed by Petitioner MEC (and others), five Respondent utilities, including IMP, vigorously argued that the MEC had no jurisdiction, due to federal preemption, to undertake remedial ratemaking remedies to protect ratepayers concerning the cost of SNF contract fees. The ALJ's ruling in that case (460a-571a) included extensive legal findings on the preemption issue (512a-533a).

Respondents' arguments seeking to deflect the Court from the prominence of the preemption issue in this case is duplicitous given the vigorous arguments made by respondent utilities in support of preemption in these related MPSC and lower Court cases, and by IMP in this case.

II. The preemption issue in this case is "ripe for review" by this Court.

Respondent IMP argues (pp 15-17) that Petitioner's preemption issues is not "ripe for review". The previous discussion demonstrates that this claim is unmeritorious. At minimum, the decisions and process below were so heavily infected by erroneous conclusions concerning preemption that respondents' claims of a separate state law or evidentiary basis for the result is not credible.

Second, as noted, this case and the *DECo* case are inter-related with respect to the preemption issue. The Court decisions below are inconsistent and circular. If, as Respondents claim, the Court in *IM Power* did not rule upon preemption on the basis the

MPSC did not rule on the issue of preemption, how could this govern over *DECo* pursuant to collateral estoppel wherein the MPSC adopted preemption!

Third, Respondent IMP states (p 6) that the preemption issue is not ripe for review because Petitioner has not appealed the *DECo* case. However, this case (*IM Power*) and the *DECo* case became separated time-wise by the lower Court's "slow-down" of the *DECo* case, and "speed-up" of this case (the *IM Power* case). Contrary to Respondent's premise, Petitioner MEC will promptly file a certiorari petition to seek this Court's review of the *DECo* decision, and requests review of this case and *DECo* on a joint basis.

III. Petitioner's appeal comports with previous federal court decisions, and does not constitute a collateral attack upon such decisions.

Respondent MPSC (pp 10-12) erroneously claims that Petitioner's appeal constitutes a collateral attack on previous federal Court of Appeals decisions such as *Northern States Power v. DOE*, 128 F3d 754 (1997). ("*Northern States*").

Respondent's argument ignores the clarity of the Court of Appeals declaratory holding in *Indiana Michigan Power Company v. DOE*, 88 F3d 1272 (1996) of the *reciprocal obligation* of utility payment of fees under the Standard Contract in exchange for DOE's commencement of SNF disposal by January 31, 1998, and the *quid pro quo* of this contractual bargain.

Respondents' argument ignores the Court's reaffirmation of this unconditional reciprocal obligation in *Northern States*. The Court's 1997 *Northern States* ruling (when faced with anticipatory contract breach) found that utility damage suits might be a "potentially adequate remedy". However, *Northern States* did not hold that any other legal or contractual remedy that might be pursued by a utility to protect its contractual bargain or to protect the fees was barred.

The *Northern States* case also certainly did not deal with the issue faced here, and did not arise in the same context – namely, whether a state ratemaking agency having jurisdiction over a retail nuclear utility is preempted from reviewing and imposing ratemaking remedies upon a utility to protect ratepayers with respect to the economic or environmental costs of nuclear energy. Respondent MPSC's argument ignores this Court's holding in *Pacific Gas & Electric v. Energy Resources Commission*, 461 U.S. 190 (1983) that this state agency power was not preempted by federal law – a holding that the MPSC and lower Court ignored in this case.

Contrary to Respondents' claims, Petitioner's appeal does not constitute a collateral attack upon any federal Court decision. The opposite is true. Petitioner seeks to prevent the MPSC and lower Courts from eviscerating this Court's holding in *Pacific Gas*, and the federal court holdings in *Indiana Michigan* and *Northern States* concerning the reciprocal obligations under the NWPA and Standard Contract. Petitioner asserts, consistent with the NWPA and Standard Contract, that utilities should

invoke all possible remedies to protect the fee payments and to seek performance under the contract – yes – even a contract with the federal government, and, failing to do so, the state ratemaking agency is not preempted by federal law from exercising its ratemaking powers to protect ratepayers.

CONCLUSION

This Court should grant the petition and review this case.

Respectfully submitted,

CLARK HILL PLC
Don L. Keskey
Counsel of Record

Clark Hill PLC
212 East Grand River Avenue
Lansing, MI 48906
(517) 318-3100

Counsel for Petitioner

Date: October 17, 2008

APPENDIX

APPENDIX 1

MICHIGAN SUPREME COURT
LANSING, MICHIGAN

Docket Nos. 134667-69 & (45);
134671; 134673-74; 134676-77

[Filed September 19, 2008]

SC: 134667
COA: 259845
MPSC: U-13808

ATTORNEY GENERAL, Appellant, v. MICHIGAN PUBLIC SERVICE COMMISSION, DETROIT EDISON COMPANY, and CONSTELLATION NEWENERGY, INC., Appellees.	)

SC: 134668
COA: 264099
MPSC: U-13808

DETROIT EDISON COMPANY; Appellee,	)

v.

MICHIGAN PUBLIC SERVICE COMMISSION, ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY, MICHIGAN ENVIRONMENTAL COUNCIL, PUBLIC INTEREST RESEARCH GROUP IN MICHIGAN, and CONSTELLATION NEWENERGY, INC.,
Appellees,

and

ATTORNEY GENERAL,
Appellant.

SC: 134669
COA: 264191
MPSC: U-13808

ATTORNEY GENERAL,
Appellant,

v.

MICHIGAN PUBLIC SERVICE COMMISSION, DETROIT EDISON COMPANY, ENERGY MICHIGAN, INC., CONSTELLATION NEWENERGY, INC., and ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY,
Appellees.

SC: 134671
COA: 264099
MPSC: U-13808

DETROIT EDISON COMPANY,
Appellee,

v.

ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY, MICHIGAN ENVIRONMENTAL COUNCIL, PUBLIC INTEREST RESEARCH GROUP IN MICHIGAN, CONSTELLATION NEWENERGY, INC., and ATTORNEY GENERAL,
Appellees,

and

MICHIGAN PUBLIC SERVICE COMMISSION,
Appellant.

SC: 134673
COA: 264099
MPSC: U-13808

DETROIT EDISON COMPANY,
Appellee,

v.

MICHIGAN PUBLIC SERVICE

COMMISSION, ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY, CONSTELLATION NEWENERGY, INC., and ATTORNEY GENERAL,
Appellees,

and

MICHIGAN ENVIRONMENTAL COUNCIL, and PUBLIC INTEREST RESEARCH GROUP IN MICHIGAN,
Appellants.

SC: 134674
COA: 264131
MPSC: U-13808

MICHIGAN ENVIRONMENTAL COUNCIL and PUBLIC INTEREST RESEARCH GROUP IN MICHIGAN,
Appellants,

v.

MICHIGAN PUBLIC SERVICE COMMISSION, DETROIT EDISON COMPANY, and CONSTELLATION NEWENERGY, INC.,
Appellees.

SC: 134676
COA: 264099
MPSC: U-13808

DETROIT EDISON COMPANY,
Appellee,

v.

MICHIGAN PUBLIC SERVICE COMMISSION, MICHIGAN ENVIRONMENTAL COUNCIL, PUBLIC INTEREST RESEARCH GROUP IN MICHIGAN, CONSTELLATION NEWENERGY, INC., and ATTORNEY GENERAL,
Appellees,

and

ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY,
Appellant.

SC: 134677
COA: 264156
MPSC: U-13808

ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY,
Appellant,

v.

MICHIGAN PUBLIC SERVICE)
COMMISSION, DETROIT EDISON)
COMPANY, ENERGY MICHIGAN, INC.,)
CONSTELLATION NEWENERGY, INC.,)
and ATTORNEY GENERAL,)
Appellees.)
)

ORDER

On order of the Court, the motion of Detroit Edison Company to exceed the page limit is GRANTED. The applications for leave to appeal the July 3, 2007 judgment of the Court of Appeals are considered, and they are GRANTED, limited to: (1) whether "transmission costs" may be included in the power supply cost recovery factor, MCL 460.6j(1)(a) and (b); and (2) whether the Court of Appeals erred in concluding that the Michigan Public Service Commission's decision to prohibit recovery of the control premium that DTE Energy paid to acquire MCN Energy by including the premium in Detroit Edison's rates was not supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28; *In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90 (July 23, 2008) (Docket Nos. 134493, 134500), slip op at 11-12.

We further ORDER that these cases be argued and submitted to the Court together with the case of *Attorney General v Michigan Public Service Commission* (Docket No. 136431), at such future session of the Court as these cases are ready for submission.

Seal of the Michigan
Supreme Court Lansing

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

September 19, 2008 /s/ Corbin R. Davis
Clerk

APPENDIX 2

MICHIGAN SUPREME COURT
LANSING, MICHIGAN

Docket No. 136433

[Filed September 19, 2008]

SC: 136433
COA: 264860
MPSC: U-013917

MICHIGAN ENVIRONMENTAL COUNCIL and PUBLIC INTEREST RESEARCH GROUP, Appellants,	)
v.	)
MICHIGAN PUBLIC SERVICE COMMISSION and CONSUMERS ENERGY COMPANY, Appellees.	)

On order of the Court, the application for leave to appeal the April 1, 2008 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

Seal of the Michigan
Supreme Court Lansing

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

September 19, 2008 /s/ Corbin R. Davis
Clerk